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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. VICTOR HENDERSON, Defendant and Appellant.	D053242 (Super. Ct. No. SCD209279)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed.

A jury convicted defendant Victor Henderson of assault with force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(1) [count 2]), corporal injury to a cohabitant (§ 273.5, subd. (a) [count 3]), dissuading a witness by force or threat (§ 136.1, subd. (c)(1) [count 4]), vandalism over $400 (§ 594 subd. (a)(b)(1) [count 6]) and vandalism under $400 (§ 594, subd. (a)(b)(2)(A) [count 7]).

1 All further statutory references are to the Penal Code unless otherwise specified.

On appeal, Henderson claims the trial court violated his due process rights by improperly admitting "propensity evidence" related to a prior incident of domestic violence. Henderson further claims that there was insufficient evidence to sustain his conviction for dissuading a witness.

We conclude the trial court acted within the scope of its discretion in admitting evidence of Henderson's prior domestic violence. We also conclude that sufficient evidence exists to sustain Henderson's conviction of dissuading a witness. We thus reject Henderson's claims and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In the early morning on September 26, 2007, Henderson and Tressia Snowten began to argue inside Snowten's apartment, where both resided. Henderson screamed obscenities at Snowten, grabbed her by the throat and pushed her against the wall. Following the altercation, Snowten waited until Henderson fell asleep to call police. Snowten testified she was fearful Henderson would not have allowed her to do so if he was awake. The police arrived and escorted Henderson out of Snowten's apartment, but did not arrest him.

Twenty or 30 minutes later, Henderson called Snowten three times, saying, "I can't believe you called the police on me. I'm going to get you." Shortly thereafter, Snowten heard a "big crash" outside. She looked out her bedroom window and saw Henderson,

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2 We view the evidence in the light most favorable to the judgment. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1427.) The factual and procedural history related to the substantial evidence issue is discussed *post*.

armed with a long pole or mop handle, damaging her car. Henderson smashed the rear window, broke off the side view mirrors and bent the windshield wipers. Snowten again called the police and reported the damage to her car as well as the threatening phone calls made by Henderson.

Later that morning, Henderson's daughter Victoria arrived at Snowten's apartment seeking the return of Henderson's property. Snowten refused to give Victoria anything and told her to leave.

Another 20 or 30 minutes later, Henderson again phoned Snowten. This time, he told her, "I'm going to get you, bitch." Snowten hung up. Henderson then came over to Snowten's apartment, broke the front window, and climbed through. Snowten called 911, saying, "He's coming through my window. Help me. He's coming in to kill me." Henderson confronted Snowten, said, "Hang up the phone, bitch," took the phone from her hand and hung it up. Next, he hit Snowten with his closed fist, striking her in the head, arms and sides 20 or 30 times. Henderson pulled Snowten to the floor by her hair and with his foot stomped on her head as she lay in a fetal position. Henderson got on top of Snowten and placed his hands over her throat and mouth, choking her.

When the police arrived, they heard Snowten yelling for help and Henderson telling her to "Shut the fuck up." The officers found the front window broken and its screen pulled off. They pulled back the blinds and saw Henderson on top of Snowten. The officers found the front door locked and entered the apartment through the window. They ordered Henderson to move away from Snowten. Henderson complied and was promptly arrested.

Snowten immediately went to UCSD Medical Center. Her injuries from the attack included bleeding, swelling and hemorrhaging within her brain and eye. Snowten testified that she has suffered debilitating headaches since the assault.

At trial, the prosecution introduced evidence of a 1996 domestic violence incident in which Henderson was convicted of a misdemeanor charge of inflicting corporal injury to a cohabitant. Karen Cook, the victim, told Chula Vista police that Henderson lived with Cook and her husband and that she and Henderson had been having an affair. According to Officer Anderson, Cook reported in November 1996 that Henderson came home after drinking on a Friday evening and punched her several times on the head. Cook told Officer Anderson that was not the first time Henderson had struck her, he became violent towards her when drinking and the abuse was escalating. Cook nonetheless did not want to press charges because she was afraid her husband would learn of their affair.

However, Cook recanted her story, testifying both in the 1996 trial and in the immediate case that Henderson had accidentally hit her after she had bitten him, he had never hit her previously, and her husband had known of their affair all along. In the case at bar, the prosecution sought to introduce evidence of her prior inconsistent statements to Officer Anderson regarding the 1996 incident. The introduction of this evidence forms the basis for Henderson's "propensity evidence" claim on appeal.

DISCUSSION

I

Propensity Evidence

Henderson claims the trial court abused its discretion in admitting the "propensity evidence" because (1) his 1996 prior misdemeanor domestic violence conviction is more than 10 years old and (2) the court did not exclude prior uncharged evidence related to that incident, which he claims was unduly prejudicial.

In evaluating abuse of discretion claims, we recognize a trial court's ruling " 'will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice.' " (*People v. Lamb* (2006) 136 Cal.App.4th 575, 582.) Our concern is not with the correctness of the trial court's decision per se, but whether it falls within the range of legally permissible options. (See *ibid.*)

A. *Admission of Henderson's Prior Domestic Violence Conviction*

Henderson argues the trial court overstepped its bounds by allowing evidence of his 1996 conviction, which was 10 years 7 months old at the time of trial. Henderson relies on Evidence Code section 1109, which provides that evidence of prior domestic violence "occurring more than 10 years before the charged offense is inadmissible . . . , unless the court determines that the admission of this evidence is in the interest of justice." (Evid. Code, § 1109, subd. (e).) Henderson argues that the court erred in

finding that admission of his prior conviction was in the "interest of justice," and that the 10-year presumption of remoteness should apply. We disagree.

Henderson argues the "interest of justice" standard must implicate the specific concerns the Legislature had when enacting Evidence Code section 1109. Henderson focuses specifically on showing an "escalating pattern of domestic violence." We note from the record here that Henderson's milder attacks of Cook, which escalated in violence, preceded the more violent attack of Snowten, demonstrating a clear pattern of domestic violence escalating in intensity. Thus, under the "interest of justice" standard articulated by Henderson, we conclude the court properly exercised its discretion in admitting his 1996 domestic violence conviction.

We also note that when propensity evidence is sufficiently probative, such as here, courts interpreting Evidence Code section 1108[3] have routinely held there is no abuse of discretion when a trial court admits evidence older than 10 years. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12-year-old act properly admitted]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284-286 [30-year-old act]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [15- to 22-year-old acts]; and *People v. Soto* (1998) 64 Cal.App.4th 966, 991-992 [21- to 30-year-old acts].) Because Evidence Code sections 1108 and 1109 are "virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence," and because there are no cases directly on point

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3 This provision allows "evidence of the defendant's commission of another sexual offense or offenses" in a sexual offense trial if it is found otherwise admissible. (Evid. Code, § 1108, subd. (a).)

referring to Evidence Code section 1109 in this context, we adopt the above courts' reasoning and conclude it also applies to Evidence Code section 1109. (*People v. Johnson* (2000) 77 Cal.App.4th 410, 417; see also *People v. Brown* (2000) 77 Cal.App.4th 1324, 1333 [Evidence Code sections 1108 and 1109 can properly be read together as complementary portions of the same statutory scheme]; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027 [adopting Evidence Code section 1108 reasoning to a separate Evidence Code section 1109 issue].) Thus, the fact Henderson's domestic violence conviction was more than 10 years old at the time of trial in the instant case does not preclude its admissibility.[4]

B. *Admission of Prior Uncharged Evidence of Henderson's Violent Acts Towards Cook*

Henderson next claims that even if the evidence of his prior acts of domestic violence was properly admitted under Evidence Code section 1109, subdivision (e), it should have been excluded as unduly prejudicial under Evidence Code sections 1109, subdivision (a)(1), and 352. We disagree.

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4 Although we do not need to reach the issue of whether incarceration "tolls" the 10-year wash-out period under Evidence Code section 1109, subdivision (e), we find support for that proposition in *People v. Wesson* (2006) 138 Cal.App.4th 959. There, the court concluded remoteness was not an issue because " 'defendant . . . was released from parole within four years of the current charges.' " (*Id.* at p. 966.) Here, Henderson was incarcerated for nearly half of the preceding 10 years, suggesting the 10-year presumption in Evidence Code section 1109, subdivision (e), did not apply to him. Because we conclude the court did not abuse its discretion in admitting the 1996 domestic violence conviction under the "interest of justice" standard in Evidence Code section 1109, subdivision (e), it is unnecessary for us to reach the "tolling" issue in this appeal.

Evidence Code section 1109, subdivision (a)(1), allows evidence of prior domestic violence to be heard in a domestic violence trial if it is admissible under Evidence Code section 352, which states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[5] The admissibility of prior domestic violence evidence thus depends on whether the evidence is probative, whether hearing it would take too much time and whether it is unduly prejudicial or misleading. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Here, the first two factors in Evidence Code section 352 are easily disposed of, inasmuch as the Legislature has decided propensity evidence has probative value in domestic violence cases by its enactment of Evidence Code section 1109. Furthermore, in Henderson's case, the similarities between the Cook and Snowten incidents display an escalating pattern of violence towards female cohabitants. As to the time constraint, the evidence consisted of only 2 of 10 prosecution witnesses, filled less than half of one trial transcript out of eight total volumes and did not unduly consume court time.

Turning to the third factor, we note some prejudice is " ' "inherent in [such] evidence" ' " (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404), as any mention of a defendant's patterned proclivity to violence is harmful to his or her case. However, under

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[5] As Henderson admits, the presence of Evidence Code section 352 insulates Evidence Code section 1109 from a due process challenge. (See *People v. Johnson*, *supra*, 77 Cal.App.4th at p. 412; accord *People v. Falsetta* (1999) 21 Cal.4th 903, 912-915.)

Evidence Code section 352, "prejudice" takes on a specific meaning; it refers to "evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) Under section 352, " 'prejudicial' is not synonymous with 'damaging.' " (*Ibid.)*

Here, evidence of Henderson's attacks on Cook was unlikely to evoke an emotional bias against him. The scope and brutality of the 1996 incident were more subdued than his assault on Snowten, making his prior acts less inflammatory than the charged conduct in the immediate case.

In addition, the recalcitrant Cook made for a very different witness than Snowten, and the record shows the difference between the two cases was discussed at length by both the prosecution and defense counsel, making it unlikely the jury confused the 1996 incident with Henderson's acts involving Snowten.

The record also shows that the trial court engaged in ample weighing of the probative and prejudicial aspects of the propensity evidence, including holding an Evidence Code section 402 hearing outside the presence of the jury in response to Henderson's objection that he lacked proper notice of Officer Anderson's testimony. (See *People v. Jennings, supra,* 81 Cal.App.4th at p. 1315 [" 'All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . [Evidence Code] section 352.' "]) We conclude the trial court properly exercised its discretion.

Moreover, even in the absence of the disputed tstimony, the record shows ample evidence supports Henderson's convictions. As a result, we conclude any error by the trial court in admitting the propensity evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

II

Sufficiency of the Evidence

Henderson next claims his conviction for dissuading a witness should be reversed because the evidence was insufficient to establish his specific intent to prevent Snowten from calling the police. We disagree.

To secure Henderson's conviction under section 136.1, subdivision (c)(1), the People had to prove: (1) Snowten was the victim of a crime; (2) Henderson attempted to dissuade her from reporting that crime to police; and (3) Henderson used force or the threat of force to do so. Our state's Supreme Court has read the language in the second element to require specific intent to stop the witness from reporting the incident. (*People v. Young* (2005) 34 Cal.4th 1149, 1210.)

When an appellant challenges the jury's resolution of a factual question, we use the substantial evidence review. (See *People* v. *Daugherty* (1953) 40 Cal.2d 876, 884.) Under this standard, we uphold the judgment as long as the record contains evidence to support the judgment that is "reasonable [in nature], credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We do not reweigh the evidence or evaluate its credibility, and we resolve all inferences in favor of the verdict. (*People v. Misa* (2006) 140 Cal.App.4th 837, 842.)

Here, the evidence shows that Snowten was a victim of a crime and was in the process of reporting it to law enforcement by calling 911 when Henderson broke through the window of her apartment and began attacking her. The evidence supports the inference that Henderson knew Snowten was calling the police, and that he attempted to stop her from doing so. Indeed, Henderson was aware than Snowten already had called police twice on the day she was attacked, and he repeatedly told her he was "going to get her" and "would kill her" for doing so. The fact one of the first actions Henderson took once inside the apartment was to grab the phone from Snowten's hand and hang it up also supports the inference that Henderson understood Snowten was in the process of calling the police, and that he did so immediately in an attempt to stop her.

Henderson does not argue the preceding point, choosing instead to assert that the People did not prove he knew Snowten was calling 911 for help rather than some unstated third party. However, given Snowten's prior calls to police that same day and the common usage of 911 emergency services in such a situation, the record supports the inference that Henderson knew Snowten was calling the police when he broke in to her apartment, and that he attempted to stop her. We therefore conclude there is substantial evidence in the record to support his conviction under section 136.1, subdivision (c)(1).

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

I CONCUR:

NARES, J.

I concur in the result.

McINTYRE, J.